



Office of the Assistant Attorney General

Washington, D.C. 20530

JUN 18 1981

Honorable Edward P. Boland
Chairman, Permanent Select Committee
on Intelligence
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

The Department of Justice has been closely following the exchange between your Committee and the Central Intelligence Agency concerning H.R. 4, the "Intelligence Identities Protection Act." As you are aware, the Department together with the Central Intelligence Agency strongly supports enactment of legislation that would prohibit individuals from disclosing identities of covert agents of the United States. The purpose of this letter is to provide the Committee with the Department's views on two issues addressed in Director Casey's April 29, 1981 letter to you regarding H.R. 4.

The first issue concerns Director Casey's suggestion that your Committee might consider amending the Privacy Protection Act of 1980 (42 U.S.C. 2000aa, et seq.) to include a reference to the intelligence identities legislation.^{1/} Director Casey's letter suggests that the Committee should consider a "technical amendment" to H.R. 4 that would amend subsections 101(a)(1) and 101(b)(1) of the Privacy Protection Act of 1980 to include a reference to the intelligence identities legislation among the national security offenses already listed there. The Department views this suggestion as entirely appropriate and in keeping with the purpose of the Privacy Protection Act. However, we are aware that Director Casey's suggestion has become the subject of some controversy.

^{1/} Senator Leahy, who is a member of the Senate Subcommittee on Security and Terrorism that is currently considering S. 391, has expressed concern about the Director's suggestion regarding amendment of the Privacy Protection Act. Consequently, I am also sending a copy of this letter to him and to Senator Denton, Chairman of the Subcommittee.

At least in part, this controversy is generated by a misunderstanding of the purpose and effect of the listing of national security offenses in the provisos in subsections 101(a)(1) and (b)(1) of the Privacy Protection Act. Many, upon first reading the Act, believe that the listing gives some special status to investigations involving these offenses so that the protections of the statute are diminished where those offenses are involved. In fact, the listing of the national security offenses results in those offenses being treated in the same manner as virtually all other offenses for purposes of the Act.

Subsections 101(a)(1) and (b)(1) of the Privacy Protection Act simply provide that a search warrant may be used to obtain documentary evidence that is held by a member of the press or another person engaged in First Amendment activities who is a suspect in the offense to which the evidence relates. This principle -- that a search warrant may be used to obtain evidence held by a suspect -- is one that was not contested by any of the critics of the Supreme Court's decision in Zurcher v. Stanford Daily nor by any of the proponents of legislation that was introduced in response to the Stanford Daily decision.

In the Privacy Protection Act, there is only one exception to this general rule that a search warrant may be used to obtain evidence believed to be in the possession of a suspect, and that is where the offense at issue is one involving the receipt, possession, or communication of the documentary evidence sought or the information that might be contained in such documents. The purpose of this limited exception, which was drafted by the Department and included in the bill developed by the last Administration, was to address the situation in which stolen or otherwise improperly obtained documents were transferred to a member of the press. In this event, the member of the press technically might be guilty of a minor, secondary offense such as receipt or possession of stolen property, or, if the information were published, of such crimes as copyright infringement or communication of trade secrets. In accordance with the Stanford Daily decision, a search for these materials held by the member of the press would be permitted since he could be regarded as a "suspect." However, the Department, in drafting the Privacy Protection Act, was of the view that it might be improper, in light of the general purposes of the legislation, to exploit the fact that a member of the press might be guilty of such a minor or secondary offense as the basis for permitting a search, particularly since it seemed doubtful that prosecution of a member of the press under these circumstances would actually be pursued. Consequently, the statute was drafted to provide an exception to the general rule that a

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suspect. Under the Act, a search warrant cannot be used where the member of the press is a suspect only in a minor, secondary offense consisting of the receipt, possession, or communication of documentary evidence or the information contained therein. However, since many national security offenses are clearly not in the category of minor, secondary offenses that are the focus of the provisos in subsections 101(a)(1) and (b)(1) of the Act and yet are phrased in terms of the receipt, possession, or communication of sensitive national security information, it is necessary to list these offenses as being outside the scope of the proviso's limited exception to the general rule that a search warrant is an appropriate means of obtaining evidence held by a suspect.

Since the intelligence identities legislation is also phrased in terms of "communication" of information, an amendment to subsections 101(a)(1) and (b)(1) of the Privacy Protection Act would be necessary to preserve the ability to use a search warrant to obtain evidence relating to the national security offenses when it is held by a member of the press who is himself a suspect in the offense. Thus, the amendment proposed by Director Casey is entirely appropriate, and it is not at odds with the purpose of the Privacy Protection Act.

The second issue concerns Director Casey's response to Representative Ashbrook's question about inclusion of a "false identification" provision in H.R. 4. In response to Representative Ashbrook's request that the CIA provide him with language for a "false identification" provision that would "meet constitutional muster," Director Casey suggested that section 800(d) of H.R. 133, introduced by Representative Bennett, might provide an adequate formulation.

The Department has no objection to inclusion in the intelligence identities legislation of a "false identification" provision that was both constitutional and enforceable, although we concur in Director Casey's observation that while the physical safety of intelligence personnel is a grave concern, the primary purpose of the intelligence identities bill is to deal with damage to our intelligence capabilities caused by unauthorized disclosures of identities, whether or not harm to individuals results in a particular case. While we recognize that Director Casey was merely attempting to be helpful and to respond to Representative Ashbrook's request, however, the Department of Justice has serious reservations about the scope of the Bennett proposal. For example, it includes within its coverage false claims that an individual is employed by an intelligence agency regardless of whether it is claimed that the individual is employed as a covert agent as defined in H.R. 4 and S. 391, or is working in an overt capacity. We question

whether Approved For Release 2008/09/15 : CIA-RDP86B00338R000200160023-0
individual from raise claims that he is an over intelligence
agency employee. We also believe that there is a substantial
question whether the false identification language of H.R. 133
would, in fact, pass constitutional muster since, for example,
it does not require that the actor be aware of the falsity of
the claim or that there be any showing of damage or danger to
the person so identified.

I hope the discussion above will be helpful to the
Committee in its considerations of H.R. 4. Please contact me
if you have any questions about the views expressed in this
letter or about any other aspects of this important legislation.

Sincerely,

SIGNED

Robert A. McConnell
Assistant Attorney General

cc: Senator Denton
Chairman, Subcommittee on Security & Terrorism
Senator Leahy